United States Court of Appeals

for the Second Circuit

INTERVENOR'S REPLY BRIEF

74-2374

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

Docket No. 74-2374

PIETRO C. RUBINO, for himself and all other persons similarly situated, et al.,

Plaintiff-Appellant,

- against -

HARRY T. NUSBAUM,

Plaintiff-Intervenor-Appellant,

- against -

JOHN J. GHEZZI, et al.,

Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFF-INTERVENOR-APPELLANT

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REPLY BRIEF OF PLAINTIFF-INTERVENOR-APPELLANT

A.

Appellees argue that "the People of the State of New York have a right to continue superior court judges" (meaning justices elected to the New York Supreme Court) in judicial service beyond the age of 70 because "they consider their service and experience more valuable" presumably than judges elected to the Civil Court of the City of New York, who may be and are assigned to serve in the Supreme Court and perform the same judicial duties and assume identical responsibilities.

That contention is demonstrably specious and constitutionally vulnerable.

Preliminarily, we must again emphasize that we do not maintain that all state constitutional and statutory age specifications, classifications and limitations are subject to federal constitutional attack. The numerous authorities cited and quoted in the briefs before this Court on the present appeal make that abundantly clear. Moreover, despite the impressive vital statistics in the amicus brief submitted by the American Association of Retired Persons (AARP), we do not deem it necessary in order to sustain the constitutional position here asserted on behalf of the Intervenor-Appellant Nusbaum, to argue as does AARP, that "mandatory retirement

statutes, provisions, practices and policies are unconstitutional." Nor do we presently find it essential to phrase the constitutional issue here presented in the sweeping language of the amicus brief on behalf of the City Family Court Judges, to wit, "May the State of New York constitutionally mandate the retirement of a judge simply by virtue of having attained age seventy?"

On the other hand, we urge that appellees' briefs bypass and indeed slough off our concrete and specifically defined constitutional challenge which involves, to use the classic judicial term, "invidious discrimination." The Attorney General's brief, as above noted, asserts (p. 26) that "the People of the State of New York have a right to continue superior court judges" after the age of seventy "since apparently, they consider their service and experience more valuable" and moreover, that such "additional judicial manpower" so created "involves a different category of judges." The flaw in that argument is readily demonstrable and if need be, can be made convincingly and conclusively clear at a plenary hearing before a three-judge court, which appellants here seek to have convened.

On what rational basis do appellees classify those elected as Justices of the New York Supreme Court as "superior court judges" to those elected as Judges in the Civil Court of the City of New York, who are actually assigned to and who do serve as Justices in the New York State Supreme Court and perform all of the duties incumbent upon a Supreme Court Justice with competence and distinction in the discharge of their many and heavy judicial responsibilities?

It suffices for present purposes to indicate that as many as 27 Civil Court Judges, including Intervenor-Appellant Nusbaum, have been and are now assigned to the Supreme Court. Can any rational basis be shown for the mandatory termination of the tenure of these judges upon reaching the age of 70, who are in judicial service in the New York Supreme Court, to which they have been assigned, and may be still functioning, because the people of the State of New York have a right to consider the judicial "service and experience" of those elected to the New York Supreme Court rather than to the New York Civil Court as "more valuable"?

The New York Court of Appeals, in Matter of Taylor v. Sise, 33 NY 2d 357, provides the answer to the foregoing inquiries and establishes the invalidity of the contention that the asserted right to continue "superior" court judges in judicial service after the age of 70 can validly include those who are elected and exclude those who may be assigned and are in fact assigned to serve as Supreme Court Justices.

In Matter of Taylor, petitioners, indicted for drug felonies, challenged the constitutionality of the New York State statute which authorized the increase in the number of Court of Claims Judges, who were thereafter assigned as acting Justices of the New York Supreme Court "to preside at their felony trials"; the statute amended § 140-a of the Judiciary Law "by increasing the number of Supreme Court Justices in each of the State's 11 Judicial Districts, except for the First and Second Judicial Districts, increasing the number of Judges in certain other courts, and authorizing the appointment of up to 68 additional Judges of the Court of Claims, with nine-year terms as provided in the Constitution (art. VI, § 9)"; the additional Judges were not subject to succession upon the

expiration of the nine-year period or upon vacancies arising from any other cause. Pursuant to the statute, 16 additional Court of Claims Judges appointed thereunder already had been "assigned to criminal parts of the Supreme Court by the appropriate Appellate Division." (pp. 361-362)

It was the petitioners' contention that the New York State Constitution (art. VI, § 6, subd. c) "provides for election of Supreme Court Justices by electors of the judicial district in which they are to serve" and further, "that in New York City the Supreme Court has 'exclusive jurisdiction over crimes prosecuted by indictment' (art. VI, § 7, subd. a)." As the opinion of Chief Judge BREITEL points out, "[b]ecause of these provisions petitioners argue that the Constitution guarantees to a person under indictment for a felony in New York City that the Trial Judge will be a properly elected* Supreme Court Justice." (p. 363). The Court of Appeals held:

> "While this argument has appeal it fails to conclude the issue. The same Constitution authorizes the temporary assignment of a Judge of the New York City Criminal Court (art. VI, § 26, subd. g) as well as a Judge of the Court of Claims (art. VI, § 26, subd. b) to the Supreme Court. There is nothing in the Constitution which precludes any Judge so assigned from sitting on a felony trial. On the contrary, the Constitution provides that

* All emphasis supplied, unless otherwise noted.

> '[w]hile temporarily assigned pursuant to the provisions of [section 26], any judge or justice shall have the powers, duties and jurisdiction of a judge or justice of the court to which assigned' (N.Y. Const., art VI, § 26, subd. k). These provisions support the conclusion that, rather than providing a defendant with a right to trial by an elected Judge, the constitutional provision requiring election of Supreme Court Justices is merely the method by which the State has decided to choose its regular Supreme Court Justices. Nothing, therefore, in the Constitution guarantees a defendant charged with a felony in New York City the right to be tried before an elected rather than an appointed acting Supreme Court Justice." (pp. 363-364)

The opinion of Chief Judge BREITEL further notes that "[t]he Appellate Division order in the instant case designates the respondents to act as Supreme Court Justices in the criminal term 'until the further order of this Court.'" (p. 364)*

The Court of Appeals concluded there was no constitutional infirmity supporting petitioners' challenge, because their felony cases were to be tried under the newly enacted legislation, not by an elected Supreme Court Justice, but one appointed under the procedure there specified as Judge of the Court of Claims and then assigned as an acting Supreme Court Justice.

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* By order of the Administrative Judge, approved by the Presiding Justice of the Appellate Division, First Judicial Department, Intervenor-Appellant Nusbaum was assigned "to hold the designated term in the Supreme Court, Civil Branch, Bronx County" for the period therein specified.

Manifestly, the foregoing authority renders baseless appellees' contention predicated upon the asserted right to continue "superior" court judges in judicial service after the age of 70, who are in the category of "superior" court judges because of having been elected to the New York Supreme Court in the first instance, and renders equally invalid the concomitant contention that New York Civil Judges assigned to the Supreme Court may not be considered in the category of "superior" court judges and hence, their service and experience are presumably less valuable to warrant continuation of judicial service after the age of 70. The classification and discrimination thus sought to be drawn and made, to justify the mandatory age termination of the tenure of a New York Civil Court Judge, as distinguished from that accorded by the Constitution and statute to an elected Supreme Court Justice we submit is invidious.

Surely, a litigant trying a case in the New York Supreme Court before a Judge of the New York Civil Court who had been assigned thereto as an acting Supreme Court Justice could not validly claim that he was unconstitutionally deprived of the right to have his case tried before a "superior" court

judge, nor does the Attorney General's brief justify any such invidious discrimination by referring to the fact that such statutory assignment does not affect "a Civil Court Judge's pay"; that he gets less pay while acting and serving as a Supreme Court Justice would hardly justify the conclusion that the "service and experience" of those elected rather than assigned to the Supreme Court is "more valuable" (Atty. Gen.'s Br., p. 26)

B.

Article VI, § 25, subd. b of the New York State Constitution and § 23 of the New York Judiciary Law, as the foregoing indicates, create an impermissible, irrebuttable presumption that a New York Civil Court Judge, after reaching the age of 70 is no longer capable of performing and fulfilling his judicial duties, either in that Court or in the Supreme Court, to which such Judge may be assigned.

It is a denial of Due Process and Equal Protection not to afford Judges elected to the New York Civil Court the same "individualized determination" accorded to those elected as Justices of the New York Supreme Court, whereby it may be certificated that after the age of 70 such Judge "is mentally and physically able to perform the full duties of such office", thereby continuing such Judge in office for successive terms of two years as therein provided.

As Mr. Justice Rehnquist notes in his dissent in LaFleur[1/], quoting the Supreme Court in Truax v. Raich, 239 U.S.

1/ Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 39 L.Ed. 2d 52; our main brief, pp. 9 et seq.

33, 41, 60 L. Ed. 131, "it requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Surely, the right to continue in judicial service, to paraphrase Justice Rehnquist in LaFleur (p. 71), is on the same lofty footing. Nor need it here be disputed that "literally thousands of state statutes create classifications permanent in duration, which are less than perfect as all legislative classifications are and might be improved on by individualized determinations."[2/] Doubtless, there are innumerable state and federal statutes which draw lines based on age, among other things, specifying mandatory retirement governed thereby.

This case, however, does not pose any burdensome task of innumerable "individual determinations of physical impairment and senility."[3/] Apparently, no difficulty at all was anticipated, nor for that matter experienced, as a plenary hearing before a three-judge court must demonstrate, that the procedure whereby it is "certificated" that after the age of 70 a justice "is mentally and physically able to perform the

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2/ Justice Rehnquist in LaFleur (p. 70), quoting the Chief Justice's dissent in Vlandis v. Kline, 414 U.S. 441, 462, 37 L. Ed. 2d 63; our main brief, p. 11.

3/ Justice Rehnquist in LaFleur (p. 71)

full duties of such office" is practical, feasible and efficient and manifestly can be just as feasible when applied to Civil Court Judges.

The Constitution and statute here involved contain their own internal recognition that the state has a reasonable alternative means of making the crucial determination as to whether judicial service may be effectively, fully and competently performed after the age of 70. An irrebuttable presumption to the contrary, therefore, is invidious in its discrimination. The certification procedure whereby it is determined whether a Justice who has been elected to the New York Supreme Court is mentally and physically able to continue in the performance of his judicial duties after the age of 70 can just as readily be applied to a Judge of the Civil Court assignable to service in the New York Supreme Court. Patently, because elected to the New York Civil Court, a Judge does not ipso facto become senile and incapable of judicial service upon reaching the age of 70 any more than a Justice elected to the New York Supreme Court. Indeed, Appellant-Intervenor was elected for a term of ten years. We submit there is no rational basis for concluding that upon reaching

the age of 70 he must conclusively be presumed to be incapable of continuing to serve in that Court if already assigned thereto, or that he is incompetent for assignment as an acting Justice thereof.

It is provided in the New York State Constitution, Art. VI, § 26, subd. g:

> "g. A judge of a court for the city of New York established pursuant to section fifteen of this article may perform the duties of his office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his residence or to the county court or the family court in any county or to the other court for the city of New York established pursuant to section fifteen of this article."

Unquestionably, a Civil Court Judge may be "temporarily" assigned to the Supreme Court for any specified period during his ten-year tenure, whether for any part, a substantial part, or if needed, for the full balance of the elected term during which such judge "shall have the powers, duties and jurisdiction of a judge or justice of the court to which assigned."[4/]

The Corporation Counsel's brief (p. 12) asserts that "[t]he interest of the people of the State of New York in limiting the term of judicial office by the age of the officeholder was expressed long ago by the New York Court of Appeals in

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4/ Matter of Taylor, pp. 4-6, supra; N.Y. Const., art. VI, § 26, subd. k.

People ex rel. Joyce v. Brundage, 78 N.Y. 403, 406 (1879); also cited are People ex rel. Jackson v. Potter, 47 N.Y. 379, 380, 385 (1872); People ex rel. Davis v. Gardner, 45 N.Y. 819, 820 (1871). Reference is made to the 1846 Constitution, as amended in 1870, which provided at that time that "[n]o person shall hold the office of judge or justice of any court longer than and until and including the last day of December next after he shall be seventy years of age." It is interesting to note in that connection that in the early 1900s "life expectancy then was 47 years and only four per cent of the population was over 65" and that today "life expectancy is 72 years."[5/] The authorities and references referred to in our adversaries' brief can hardly serve to justify the invidious discrimination here sought to be sustained, bearing in mind that judicial tenure was mandatorily terminated at that early date, 23 years after normal life expectancy and when only 4% of the population survived the age of 65.

However, as we have said, we do not want to be drawn into a controversy as to the validity of general classifications, whether based on age, sex, or for that matter on specific occupations or activities. For example, a recent note in the New York

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5/ New York Post, American Society and the Over-65s, Dec. 19, 1974, p. 53, quoting Donald Sherbond, a consultant to AARP.

University Law Review (Vol.49, Oct.1974, No. 4, p.479) entitled "Illegitimacy and Equal Protection" is critical of Supreme Court decisions in recent years, which it is said have never clearly articulated the equal protection standard in that area. Perforce thereof, it is contended that "lower court judges have been unable to analyze with certainty whether or not a particular discrimination against illegitimates amounts to a denial of equal protection." (p. 474) Supreme Court decisions are cited, which it is said "led many commentators to the reasonable conclusion that illegitimacy was to be considered a constitutionally 'suspect' classification for equal protection purposes" (p. 479). We may add that the same view may be justly voiced with respect to age or any chonological factor, as noted in Mr. Justice Rehnquist's critical dissent in LaFleur (39 L. Ed. 2d, at p. 71). The note asserts that "it will be shown that the middle-level equal protection analysis employed by the Court in these cases is a 'sliding scale' or a balancing approach."[6/]

The legal perplexities involving these problems of classification and discrimination suggest, we submit, that it is legally impossible to set down a general rule defining

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6/ N.Y.U.L.R., supra, at p. 480.

the specific limits of classification or a precise judicial line of demarcation as to discrimination that is proper or invidious.

Indeed, the recent cases involving age are illustrative of the fluid character of the problem. In McIlvaine v. Pennsylvania, 415 U.S. 986 (dec. Mar. 25, 1974), relied on in both of appellees' briefs, the question presented was whether the Pennsylvania Administrative Code "which mandates retirement of Pennsylvania State policemen at the age of sixty (60) violates the Equal Protection clause of the Fourteenth Amendment" of the federal Constitution. The constitutionality of the provision of the Code was sustained in the lower court and by the Supreme Court of Pennsylvania (309 A. 2d 801). The U.S. Supreme Court, upon consideration of the appellee's motion to dismiss or affirm, dismissed "for want of a substantial federal question"; BLACKMUN,J. voting to note probable jurisdiction. There is no indication, of course, that such determination was intended narrowly to confine the "irrebuttable presumption rationale", nor that the failure to provide "individualized determination" as to a policeman's capacity to fulfill his normal duties is constitutionally unjustified.

However, that is a far cry from the instant case, in which there is state constitutional and statutory provision, during the statutory tenure of judicial service, for individualized determination and certification that a Justice elected to the New York Supreme Court reaching the age of 70 "is mentally and physically able to perform the full duties of such office", whereas no such provisions and procedure are available to the New York Civil Court Judges, who may be and are assigned to serve in the same Court.

And in Weisbrod v. Lynn, F. Supp. , relied on in the Attorney General's brief (p. 7), a three-judge court was convened pursuant to the order in conformity with the opinion cited and quoted in our main brief (pp. 9-10; 494 F. 2d 1101); that action was summarily dismissed by the three-judge court on the basis of McIlvaine. Weisbrod filed an action which sought, inter alia, a declaratory judgment that the Federal Employee Mandatory Retirement Law, 5 U.S.C., § 8335, is unconstitutional on its face and as applied to plaintiff.

Weisbrod's motion for the convening of a three-judge court, claiming that the case raised substantial questions concerning the constitutionality of the foregoing statute, was

denied by the District Court, which dismissed the action for failure to state a claim upon which relief could be granted. That determination, as our main brief indicates (pp. 9-10), was reversed and the case was remanded "with instructions to convene a three-judge court."[7/] The three-judge court, as already noted, on the authority of McIlvaine denied plaintiff's motion and granted defendant's motion for summary judgment. Xerox copies of the opinion, not yet officially reported, will be submitted if desired by this Court. As the opinion indicates, 5 U.S.C. § 8335 provides that:

> "(a) Except as otherwise provided by this section, an employee who becomes 70 years of age and completes 15 years of service shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes 70 years of age or completes 15 years of service if then over that age, and pay ends from that day."
>
> * * *
>
> "(c) The President, by Executive Order, may exempt an employee from automatic separation under this section when in his judgment the public interest so requires.
>
> "(d) The automatic separation provisions of this section do not apply to --
>
> * * *
>
> "(4) an employee in the judicial branch appointed to hold office for a definite term of years."

It is apparent that the factual and legal pattern is clearly distinguishable from that before this Court. Weisbrod under the foregoing statute was entitled to complete 15 years of service, even if such period of service carried him beyond the age of 70. The President, by executive order, could exempt any employee from automatic separation when in his judgment the public interest so required and the automatic separation provisions had no application to an employee in the judicial branch appointed to hold office for a definite term of years.

Judge Anderson, of the District Court of Minnesota, in his article in the Loyola Law Review, Loyola University, New Orleans (Vol. 20, 1973-4, p. 153), entitled "Age Discrimination: Mandatory Retirement from the Bench", broadly argues that "[m]andatory retirement of judges is a prime example of arbitrary age discrimination that has become a serious problem" (p. 153) and is "one concerning individuals of completed training, proven talents and experience" (p. 154). And that "mandatory retirement of judges at a specified age" which may "arise when the judicial term of an elected judge runs past his retirement age" creates "a direct confrontation between a popular mandate favoring the judge's competence and the prior legislative discrimination of

incompetency at a specified age (p. 157). The article cites Rinaldi v. Yeager, 384 U.S. 305, 308-9, holding that

> "[t]he Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it established. It also imposes a requirement of some rationality in the nature of the class singled out. . . But the Equal Protection Clause does require that. . . the distinctions [that] are drawn have 'some relevance to the purpose for which the classification is made.'"

CONCLUSION

This case clearly presents a substantial federal constitutional question involving the validity of the mandatory termination of the judicial term of a New York Civil Court Judge upon reaching the age of 70, resulting from an "impermissible irrebuttable presumption" that the judge is then mentally and physically unable to perform the full duties of such office, whereas there is an existing constitutional and statutory procedure in the State of New York for "individualized determination" of that critical issue as to elected Supreme Court Justices, not made available to Civil Court Judges who may be and are assigned to that Court.

The order below should be reversed and the case remanded to the District Court, with instructions to convene a three-judge court.

Respectfully submitted,
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